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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/802,865	03/18/2004	Philippe Jerome Didier Riviere	88265-7344	5444
29157	7590	07/19/2006	EXAMINER	
BELL, BOYD & LLOYD LLC P. O. BOX 1135 CHICAGO, IL 60690-1135			PEARSE, ADEPEJU OMOLOLA	
			ART UNIT	PAPER NUMBER
			1761	
DATE MAILED: 07/19/2006				

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/802,865	RIVIERE ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Adepeju Pearse	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 22 March 2006.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-5 and 7-16 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-5 and 7-16 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                        | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)    | Paper No(s)/Mail Date. _____  |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                                    |

## **DETAILED ACTION**

### ***Election/Restrictions***

1. It is noted on page 8 of the remarks that applicant's election of group I (claims 1-16) in the reply filed on 3/22/2006 recites with traverse. However, after clarification with Mr. Barrett, it was made known that this was a typo and it should be without traverse.

### ***Claim Objections***

2. Claim 1 is objected to because of the following informalities: Applicant recites a sweetening agent "mixture having at least 90% of its weight selected from the group consisting of glucose, fructose, polymers of n molecules of glucose and combinations thereof". It is unclear how a mixture can consist of one compound i.e. as recited 90% of the sweetening agent mixture could be glucose or fructose or the polymer. For examining purposes it would be assumed that the sweetening agent comprises glucose, fructose, polymers of n molecules of glucose and combinations thereof at a range from 6 to 30%. Appropriate correction/clarification is required.
3. Claim 7 is objected to because of the following informalities: Claim 7 is dependent on cancelled claim 6. For examining purposes it is assumed as dependent on claim 1. Appropriate correction is required.

### ***Claim Rejections - 35 USC § 112***

The rejection of claim 14 has been withdrawn.

### ***Claim Rejections - 35 USC § 102***

4. Rejection withdrawn

***Claim Rejections - 35 USC § 103***

5. Claims 1-5 and 7-16 are rejected under 35 U.S.C. 103(a) as being obvious over Whelan et al (US Pat. No. 5,084,295) in view of Cole et al (US. Pat. No. 4,452,824).

6. With regard to claim 1, Whelan et al disclose a frozen dessert composition comprising of water, proteins, fat, sweetening agents and stabilizing agents (Col 6 lines 1-8, lines 31-38). The sweetening agents include glucose, fructose, sucrose and mixtures of these sweeteners and comprises from about 10 to about 20% of the product (col 12 lines 5-15), which is within applicant's recited range. The stabilizing agents include microcrystalline cellulose, locust bean gum, etc and they produce smoothness in the textural properties of the product and retard ice crystal growth during storage of the product (col 14 lines 39-55). It would be obvious to expect that the particle size of the stabilizing agent is small enough to act as a nucleating agent because it is well known that microcrystalline particles have very small particle sizes. In addition it would be expected that the water is frozen because it is utilized in a frozen dessert. However, Whelan failed to disclose the amounts of each component in the sweetening mixture. The blending of sweeteners is well known for their art recognized function. It would have been obvious to one of ordinary skill in the art to expect that the amount of sweetener included is an experimental result variable based on sweetness intensity of the particular sweetener and the sweetness effect desired in the product absent any clear and convincing evidence and/or arguments to the contrary.

7. With regard to claim 2, Whelan et al disclose microcrystalline cellulose as a stabilizing agent. The amount of stabilizer included in the frozen dessert is typically from about 0.05 to about 0.5%, this range is within applicant's recited range (col 14 lines 57-61).

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8. With regard to claim 3, Whelan et al disclose that the amount of water present is from about 50 to about 75%, this range encompasses applicant's recited range (col 14 lines 30-32). It would be obvious to expect that the water is partially frozen/frozen because it is utilized in a frozen dessert.

9. With regard to claims 4-5, Whelan et al disclose suitable emulsifiers from about 0.05 to about 2% (col 14 lines 11-12) and optional ingredients such as egg yolk from about 1 to 2% of the product (col 15 lines 1-6). These ranges are within applicant's recited range. Stabilizers including carrageenan, alginate, gelatin, carboxymethylcellulose, etc (col 14 lines 48-55) which are well known in the art as thickeners.

10. With regard to claim 7, Whelan failed to disclose the amounts of each component in the sweetening mixture. The blending of sweeteners is well known for their art recognized function. It would have been obvious to one of ordinary skill in the art to expect that the amount of sweetener included is an experimental result variable based on sweetness intensity of the particular sweetener and the sweetness effect desired in the product absent any clear and convincing evidence and/or arguments to the contrary.

11. With regard to claim 8, Whelan et al failed to disclose a glycerol content in the frozen dessert product. However, Cole et al teach a soft frozen dessert comprising low molecular weight polyhydric alcohols such as glycerol at a level of 1% to 5%, which encompasses applicant's recited range in order to function as freezing point depressants to impart increased softness to a frozen product (col 2 lines 35-50). It would have been obvious to one of ordinary skill in the art to incorporate glycerol as a freezing point depressant.

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12. With regard to claim 9, Whelan et al disclose a fat content from about 2 to about 20% (col 4 line 59). This range encompasses applicant's recited range.

13. With regard to claims 10-11, Whelan et al disclose suitable fats including sunflower oil, coconut oil, safflower oil, olive oil that are all plant derived (col 9 lines 1-10).

14. With regard to claim 12, Whelan et al disclose proteins from about 3 to about 15% (col 11 lines 27-29). This range is within applicant's recited range.

15. With regard to claims 13-14, Whelan et al disclose suitable proteins including, whole milk, skimmed milk, skimmed milk from which a portion of the lactose has been removed, neutralized acid whey, modified whey, whey protein concentrate etc (col 11 lines 35-50). It would be expected that modified whey encompasses demineralized whey because it has been modified by demineralization.

16. With regard to claim 15, Whelan et al disclose non-dairy based sources of protein such as vegetable e.g. soy protein (col 11 lines 59-61), which is a leguminous plant.

17. With regard to claim 16, Whelan et al disclose other components of the frozen dessert product including flavoring substances (col 13 line 21-24).

18. Claims 1-5 and 9-14 and 16 are rejected under 35 U.S.C. 103(a) as being obvious over Morley (US Pat. No. 4,427,701) in view of Cole et al (US. Pat. No. 4,452,824). Morley discloses a frozen dessert comprising water, proteins, fat, sweetening agents and stabilizing agents. The sweetening agents include fructose, corn syrup, etc at a range from 22 to 30% (col 6 lines 26-37), which is within applicant's recited range. The stabilizing agents comprise microcrystalline cellulose, locust bean gum, guar gum etc (col 7 lines 30-33). It would be expected that the

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particle size of the stabilizing agent is small enough to act as a nucleating agent because it is well known that microcrystalline particles have very small particle sizes. In addition it would be expected that the water is frozen because it is utilized in a frozen dessert. However, Morley failed to disclose the amounts of each component in the sweetening mixture. The blending of sweeteners is well known for their art recognized function. It would have been obvious to one of ordinary skill in the art to expect that the amount of sweetener included is an experimental result variable based on sweetness intensity of the particular sweetener and the sweetness effect desired in the product absent any clear and convincing evidence and/or arguments to the contrary.

19. With regard to claim 2, Morley discloses microcrystalline cellulose as a stabilizing agent.

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The amount of stabilizer included in the frozen dessert is typically from about 0.05 to about 1.1%, this range is within applicant's recited range (col 6 line 68, col 7 lines 1-2).

19. With regard to claim 3, Morley discloses that the amount of water present is from about 50 to 60%, this range is within applicant's recited range (col 5 lines 66-67). It would be expected that the water is partially frozen/frozen because it is utilized in a frozen dessert.

20. With regard to claims 4-5, Morley discloses suitable emulsifiers from 0.45 to 0.775% (col 7 lines 39-40) such as mono and di-glycerides. This range is within applicant's recited range. Morley discloses that the stabilizer system employs gelling agent such as gelatin, carrageenan, sodium alginate etc (col 7 lines 22-26) that are well known in the art as thickeners.

21. With regard to claim 9, Morley discloses a fat content from 0 to 5% (col 5 line 15-17). This range is within applicant's recited range.

22. With regard to claims 10-11, Morley discloses suitable fats including butter fat, sunflower oil, coconut oil, safflower oil, olive oil that are all plant derived (col 5 lines 24-37).

23. With regard to claim 12, Morley discloses proteins from 4 to 5.5% (col 5 lines 62-63). This range is within applicant's recited range.

24. With regard to claims 13-14, Morley discloses suitable proteins including, milk, neutralized acid whey, modified whey, whey protein concentrate etc (col 5 lines 50-65). It would be expected that modified whey encompasses demineralized whey because it has been modified by demineralization.

25. With regard to claim 16, Morley discloses other components of the frozen dessert product including flavoring substances (col 6 lines 5-16).



***Response to Arguments***

20. Applicant's arguments filed 3/22/2006 have been fully considered but they are not persuasive. Applicant argues that none of the applied references teach a sweetening agent mixture comprising a mixture having at least 90% of its weight selected from the group consisting of glucose, fructose, polymers of n molecules of glucose and combinations thereof. As stated above, it is unclear how a mixture can comprise of one compound as instantly claimed. In addition, as cited in the prior office action, Whelan et al disclose a frozen dessert composition comprising of water, proteins, fat, sweetening agents and stabilizing agents (Col 6 lines 1-8, lines 31-38). The sweetening agents include glucose, fructose, sucrose and mixtures of these sweeteners and comprises from about 10 to about 20% of the product (col 12 lines 5-15), which is within applicant's recited range. In addition, Morley discloses a frozen dessert comprising water, proteins, fat, sweetening agents and stabilizing agents. The sweetening agents include fructose, corn syrup, etc at a range from 22 to 30% (col 6 lines 26-37), which is within applicant's recited range.

21. Applicant's arguments filed 3/22/2006 have been fully considered but they are not persuasive. As previously stated, it is unclear how a mixture can comprise of one compound as instantly claimed. In this regard, the rejections of claims 7-8 that depend on claim 1 is deemed proper.

***Conclusion***

22. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Adepeju Pearse whose telephone number is 571-272-8560. The examiner can normally be reached on Monday through Friday, 8.00am - 4.30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



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